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No. 87-271

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner,
v.
EUGENE F. BRIECK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae in support of the Petitioner. The written consents of all parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide assocation of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. Its governing body is a Board of Directors composed of experts and specialists in equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment opportunity programs and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its trade association members, are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* and Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to charges of discrimination pursuant to the ADEA and Title VII, EEAC's members are interested in the extent to which an employer's business judgment may be attacked as a pretext for discrimination under this Court's decisions in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Thus, the issues presented in this appeal are extremely important to the nationwide constituency which EEAC represents. The court below, relying on its prior decision in *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 108 S.Ct. 26 (1987), allowed the plaintiff to survive summary judgment merely by questioning his employer's judgment as to the company's need for a more versatile employee following a reduction in force. This position is inconsistent with this Court's holding in *Burdine* that the plaintiff bears the ultimate burden of proving intentional discrimination, and also requires the defendant employer to prove the absence of a discriminatory motive, in conflict with *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978) (per curiam).

Because of its interest in the application of the nation's civil rights laws, EEAC has filed over 230 briefs as amicus curiae in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this amicus activity, EEAC has participated in several cases involving the burden of proof in discrimination cases, including *Burdine*; *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *U.S. Postal Service Board of Governors*

v. Aikens, 460 U.S. 711 (1983). Furthermore, a number of the other cases in which EEAC has participated have involved the proper interpretation of the ADEA. *See, e.g., Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *Lorillard v. Pons*, 434 U.S. 575 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977); *Burns v. Equitable Life Assurance Society of the United States*, 696 F.2d 21 (2d Cir. 1982), *cert. denied*, 464 U.S. 933 (1983). See also *McLaughlin v. Richland Shoe Co.*, No 86-1520, *cert. granted*, October 6, 1987, 56 U.S.L.W. 3242, (*decision pending*) (standard for willful violations under the FLSA, Equal Pay Act and ADEA).

STATEMENT OF THE CASE

Petitioner Harbison-Walker Refractories ("Harbison-Walker") sells specialized ceramic brick products, primarily to the domestic steel industry. Joint Appendix ("J. App.") at 12. Harbison-Walker hired Respondent Eugene Brieck in June 1965 as an installation specialist in the Iron and Steel Marketing Support Group ("Steel Group"). Appendix to the Petition for Certiorari ("Pet. App.") at 336a. Brieck was one of four installation specialists, whose duties were to supervise the installation of Harbison-Walker products in steel making furnaces, train the customer's employees in operations and maintenance, and resolve complaints. *Id.*

As a result of the decline in the domestic steel industry, Harbison-Walker's sales fell dramatically between 1979 and 1982, forcing Harbison-Walker to cut its workforce to minimize losses. J. App. at 12. Harbison-Walker first instituted a voluntary retirement program in April 1982. J. App. at 12-13. Further reductions were necessary, however, and in June 1982, management decided to reduce its remaining salaried workforce by ten percent. J. App. at 13.

Six employees in the Steel Group were selected for layoff in July 1982, including two of the four installation specialists, Brieck (age 55) and W. E. Meixell (age 59).

Pet. App. at 13a. Harbison-Walker's primary consideration in determining which employees to furlough and which to retain, according to William Sekeras, then Manager of the Steel Group, was "the ability of employees to perform the job functions remaining in the reduced business setting." J. App. at 13. Meixell had only been with Harbison-Walker since 1980 and therefore had the least seniority and experience. J. App. at 105. Of the remaining three, Malarich had broader experience than Brieck and was judged from past performance to be more capable. *Id.* Faust, a Harbison-Walker employee since 1966, had multi-functional capabilities, based upon his prior experience as a sales correspondent, his superior work with records and reports, and his singular experience with installation work in blast furnace casthouses. J. App. at 14. Faust also had higher performance evaluations than Brieck. J. App. at 15.

As business continued to decline, Malarich was laid off in July and Faust in November. Pet. App. at 13a. When business began to improve in July 1983, Faust was recalled for the same reasons that he had been temporarily retained the previous summer. J. App. at 15.

Brieck contends that Harbison-Walker's decision to lay him off and recall Faust constitutes age discrimination. Brieck filed suit under the ADEA. Following discovery, the U.S. District Court for the Western District of Pennsylvania granted summary judgment in favor of Harbison-Walker, holding that Brieck had failed to show that Harbison-Walker's justification was a pretext for age discrimination. Pet. App. at 12a. The U.S. Court of Appeals for the Third Circuit reversed. Holding that the district court had incorrectly required Brieck to establish a direct inference of age discrimination, the Third Circuit concluded that "an ADEA plaintiff's evidence need only permit a reasonable inference that the employer's proffered explanation for the discharge is unworthy of credence" to survive summary judgment. Pet. App. at 2a.

SUMMARY OF ARGUMENT

Federal civil rights laws were never intended to supersede traditional management prerogatives to make business decisions concerning employees, as long as those decisions are not tainted by discriminatory intent. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). *See also United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979). Accordingly, while this Court allows a plaintiff to raise an inference of discrimination merely by showing that he or she was treated differently than another person outside a protected class, the presumption "drops from the case" when an employer articulates a legitimate, nondiscriminatory reason for its decision. *Burdine*, 450 U.S. at 255 n. 10. The plaintiff must then show that the employer's reason is actually a pretext for discrimination. *Id.* at 253.

While a plaintiff may prove pretext indirectly by showing that the employer's reason is "unworthy of credence," this method is limited to those cases in which the reason may be objectively proven false. In contrast, when the employer's decision was a business judgment based on subjective factors, the plaintiff does not present a genuine issue of fact for trial merely by challenging the wisdom of that judgment. *Dea v. Look*, 810 F.2d 12 (1st Cir. 1987).

Whether filling an open position or implementing a reduction in force, an employer often must choose from among a number of qualified candidates. Thus, a number of necessarily subjective factors play a role in the decision, including opinions as to past performance, the value of prior experience and qualifications, and the company's needs in relation to the position in question. In each such situation, the person most qualified to make the judgment is that person selected by the employer, based on his own expertise, to select the appropriate person for the job. Rarely will that selection be immune to attack from a plaintiff who would prefer to substitute his own subjective analysis. However, the mere asser-

tion that some factors should have been given more weight than others, or that the decision-maker misperceived the requirements of the position filled, do not render that decision "unworthy of credence."

As in cases arising under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, those seeking relief under the Age Discrimination In Employment Act of 1967, *as amended*, 29 U.S.C. § 621 *et seq.*, must demonstrate that an illegal characteristic was a determining factor in an adverse employment decision. *Dale v. Chicago Tribune Company*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 954 (1987). In order to survive summary judgment, the plaintiff must show that there is a genuine issue of fact for trial. *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). Merely inviting a jury to second-guess the employer's business judgment does not present a triable issue of fact.

The court below found a credibility issue in that Harbison-Walker may have failed to accurately assess the requirements of a position remaining after a reduction in force. Holding that a jury could find the employer's explanation to be "unworthy of credence," the Third Circuit reversed a grant of summary judgment, concluding that if the duties performed by the selectee did not conform to those predicted by the employer, as detailed in its articulated explanation, an inference of discrimination could arise.

Since the plaintiff in fact attacked his employer's business judgment, the Third Circuit's conclusion conflicts with the ADEA, which only prohibits employment actions based on age, 29 U.S.C. § 623, and with this Court's holding in *Burdine*, which requires the plaintiff to prove intentional discrimination and also cautions against interference with management prerogatives. Moreover, the court below concluded that the employer's burden on summary judgment is to show that the plaintiff will be unable to produce direct evidence of discrimination or to

show that the employer's reason is subject to factual dispute, contrary to this Court's holding in *Celotex* that the moving party need not produce evidence negating the opponent's claim.

ARGUMENT

I. AN ADEA PLAINTIFF, WHO BEARS THE ULTIMATE BURDEN OF PROVING INTENTIONAL DISCRIMINATION, CAN NOT AVOID SUMMARY JUDGMENT MERELY BY QUESTIONING THE EMPLOYER'S BUSINESS JUDGMENT.

A. *Burdine* Requires A Showing Of Pretext *For Discrimination.*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits discrimination in employment on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2. Similarly, the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, prohibits discrimination based on age. 29 U.S.C. § 623. Neither statute, however, authorizes recovery merely because an employer's legitimate exercise of managerial discretion adversely affected a member of a protected class. Both Title VII and the ADEA provide a remedy only when the action complained of was taken "because of" the illegal criterion.[1]

In a series of decisions beginning with *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) and continuing through *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court has developed a method to allow a plaintiff, in appropriate cases, to demonstrate disparate treatment and violation of employment discrimination laws "despite the

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[1] Under § 703(a) of Title VII, it is an unlawful employment practice for an employer to discriminate against an employee "*because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (emphasis supplied). The ADEA prohibits discrimination against any individual "*because of* such individual's age." 29 U.S.C. § 623(a) (emphasis supplied).

unavailability of direct evidence." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979). Recognizing that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983), so that direct, "smoking gun" evidence is often unavailable, this Court has instead developed "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 577 (1978).

McDonnell Douglas established the basic order of proof. As this Court explained in *Burdine*:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*, at 802, 93 S.Ct. at 1824. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*, at 804, 93 S.Ct. at 1825.

450 U.S. at 252-53. The Court in *McDonnell Douglas* enumerated the factors which make up the plaintiff's prima facie case in a claim of racial discrimination in hiring under Title VII.[2] The specific requirements, however, necessarily will vary with the facts of the case.

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[2] The Court articulated plaintiff's initial burden as follows:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802.

McDonnell Douglas at 802 n. 13.[3] Establishment of the prima facie case eliminates "the most common nondiscriminatory reasons for the plaintiff's rejection," *Burdine*, 450 U.S. at 254, such as plaintiff's lack of qualifications or unavailability of the position. The effect of plaintiff's prima facie case, then, is to create a "legally mandatory, rebuttable presumption" of intentional discrimination. *Id.* at n. 7.

The burden then shifts to the employer to state its reasons for taking the contested employment action. *Id.* In so doing, the employer rebuts the presumption created by plaintiff's prima facie case, and the presumption then "drops from the case." *Id.* at 255, n. 10. Plaintiff will then have the opportunity to demonstrate that the employer's reasons were actually "a pretext for discrimination." *Id.* at 253. *See also Furnco*, 438 U.S. at 578. The term "pretext" does not mean that the plaintiff must show that the discriminatory reason was the sole factor in the employer's decision, but merely that it was a "but for" cause. *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273, 282 n. 10.

The ultimate burden of proving intentional discrimination never shifts from the plaintiff. *Burdine*, 450 U.S.

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[3] For example, in *Burdine*, where the plaintiff alleged that she was denied a promotion and terminated because her sex, this Court adapted the *McDonnell Douglas* formula to a charge of failure to promote, stating that "The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." 450 U.S. at 253. Similarly, an ADEA plaintiff must establish a prima facie case by showing that (1) he was a member of the protected class; (2) he was discharged; (3) he was qualified for the position; and (4) he was replaced by a younger person. *Ackerman v. Diamond Shamrock Corporation*, 670 F.2d 66, 69 (6th Cir. 1982). *See also Douglas v. Anderson*, 656 F.2d 528 (9th Cir. 1981) (an ADEA plaintiff satisfies the fourth prong of the *McDonnell Douglas* test by showing that he was replaced by a substantially younger employee with equal or inferior qualifications).

at 253. Thus, once the employer has explained its conduct, "the factual inquiry proceeds to a new level of specificity," *id.* at 255, and the plaintiff's burden of proving pretext merges with the ultimate burden of proof. *Id.* at 256.

In short, the real issue in every employment discrimination case of disparate treatment is whether or not the employer has intentionally based an employment decision on an illegal criterion. When the employer has presented facially valid reasons for its conduct, the plaintiff must in turn show that those reasons "were in fact a coverup for a . . . *discriminatory* decision." *McDonnell Douglas*, 411 U.S. at 805 (emphasis supplied). In fact, the plaintiff is required to prove by a preponderance of the evidence that an illegal criterion was "the determining factor" in the employment decision. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979).

B. Employment Discrimination Laws Were Not Intended To Preclude Legitimate Managerial Discretion.

Most if not all employment-related decisions are based on the employer's desire to choose the best person for the job. *See Furnco*, 438 U.S. at 577 ("We know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.") The purpose of anti-discrimination legislation is to ensure that those decisions are made without consideration of illegal and inappropriate factors such as race, sex or age. *See, e.g. Griggs v. Duke Power Company*, 401 U.S. 424, 431 (1971). "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions." *McDonnell Douglas*, 411 U.S. at 801. Absent use of illegal criteria, however, Title VII and the ADEA were not designed to supplant managerial discretion by forcing employers to prefer candidates with protected characteristics solely

because of those characteristics. Referring to Title VII, this Court has said that "The statute was not intended to 'diminish traditional management prerogatives.'" *Burdine*, 450 U.S. at 259 (quoting *United Steelworkers v. Weber*, 443 U.S. at 207.)

Indeed, the legislative history of Title VII reveals that it would not have been enacted without recognition of, and preservation of, managerial discretion in employment decisions.

> Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible." H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963), U.S. Code Cong. & Admin. News 1964, p. 2391.

United Steelworkers v. Weber, 443 U.S. 193, 206 (1979).[4]

Likewise, the ADEA was not intended to supersede traditional management prerogatives.[5] Accordingly, Title VII and the ADEA preserve the employer's right to make decisions based on his own business judgment. "An em-

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[4] *See also Local Number 93, International Association of Firefighters, AFL-CIO CLC v. City of Cleveland*, 106 S.Ct. 3063 (1986) (Congress sought to avoid undue federal interference with managerial discretion); *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S.Ct. 1442 (1987) (Stevens, J., concurring).

[5] *See, e.g., Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) ("The Age Discrimination in Employment Act, however, was not intended as a vehicle for judicial review of business decisions."); *Parcinski v. The Outlet Company*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983) ("The Age Discrimination in Employment Act does not authorize the courts to judge the wisdom of a corporation's business decisions."); *Jorgensen v. Modern Woodmen of America*, 761 F.2d 502, 505 (8th Cir. 1985) ("The ADEA is not intended to be used as a means of reviewing the propriety of a business decision").

ployer is entitled to make his own policy and business judgments, and may, for example, fire an adequate employee if his reason is to hire one who will be even better, as long as this is not a pretext for discrimination." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n. 6 (1979).

C. When The Employer's Reason Is Within The Realm Of Management Prerogative, The Plaintiff Should Be Required to Do More Than Attack That Reason to Survive Summary Judgment.

1. *Proof Of Pretext By Showing That The Employer's Reason Is Unworthy Of Credence Is Limited To Those Cases In Which The Employer's Reason Can Be Objectively Demonstrated To Be False.*

In *Burdine*, this Court explained that pretext may be demonstrated "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256. Under this Court's analysis it is clear that a discrimination plaintiff may only prevail if he is able to show that the employer's reasons were in fact a pretext *for discrimination*. The fact that an employer's personnel decision may be vulnerable to criticism because it is necessarily based on subjective factors does not thereby render it "unworthy of credence." Therefore, only those plaintiffs who demonstrate that the employer's reason is objectively false should be permited to prevail under the "unworthy of credence" prong of this Court's "pretext" test.

When there is direct evidence of possible discriminatory motivation, the plaintiff need not question the employer's reason, but merely presents evidence that there were other, discriminatory reasons which more likely motivated the employer.[6] Direct evidence is rarely available, however, so that a plaintiff faced with the necessity of proving pretext will probably mount an attack on the employer's reasons. When a plaintiff thus relies solely on the second *Burdine* alternative, this Court's use of the phrase "unworthy of credence" in *Burdine* becomes crucial.

Since the plaintiff's burden of proving pretext merges with his ultimate burden of showing intentional discrimination, a fair reading of *Burdine* and the related decisions indicates that to prove an employer's reason "unworthy of credence" requires a showing that it can be objectively proven false. First, the employer's burden is merely one of production; it "need not persuade the court that it was actually motivated by the proffered reasons." *Burdine*, 450 U.S. at 254. Therefore, to allow the plaintiff to prevail merely by contesting the wisdom of the employer's reasons, with no evidence whatsoever of actual discriminatory intent, "would impose on the defendant an almost impossible burden of proving 'absence of discriminatory motive,'" which this Court declined to do in *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978) (per curiam). *White v. Vathally*, 732 F.2d 1037, 1043 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984).[7] Moreover, permitting the plaintiff to succeed merely by casting doubt on the employer's reason "would improperly revive the presumption in plaintiff's favor which was raised by the prima facie showing but 'dispel[led] by the defendant's articulation of reasons." *Id.* (citing *Furnco*, 438 U.S. at 578).

A plaintiff could demonstrate that the employer's reason is false by showing that a cited incident was far removed in time, or that the reason also applied to another employee who was not discharged. Or, if the plain-

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[6] In *McDonnell Douglas*, for example, this Court suggested that the plaintiff might show that white employees who engaged in similar conduct were retained while plaintiff was terminated, or evidence of the employer's practices regarding minority employment. 411 U.S. at 804.

[7] *See also Dea v. Look*, 810 F.2d 12 (1st Cir. 1987).

tiff can show that the employer's reason is a complete fabrication, created after the fact to conceal the real reason, it may lead to the conclusion that the real reason was discriminatory. "If the employer is trying to hide its real reason, that effort—coupled with the evidence making up the employee's prima facie case—may convince the trier of fact that the real reason needed to be hidden and therefore probably was discriminatory." *Pollard v. REA Magnet Wire Company, Inc.*, 824 F.2d 557, 559 (7th Cir.), *cert. denied*, 108 S.Ct. 488 (1987).

There is much less reason to let the case go to trial, however, when the plaintiff merely attacks the wisdom of his employer's legitimate business decision. In many employment situations, the outcome will be based on the decision-maker's perception, based on his prior experience as well as his knowledge of the company's needs and the duties to be performed by the selectee, of the relative merits of a number of qualified candidates. It is precisely in this context that the preservation of management prerogatives is critical. In some situations, the employer's reason rests entirely within the employer's business judgment. Where the plaintiff does not demonstrate that the employer's explanation is fabricated, but merely challenges the wisdom or the accuracy of a business judgment,[8] *Burdine's* careful preservation of traditional management prerogatives precludes recovery.

A number of the courts of appeals have concluded that an unsupported attack on the employer's business acumen will not substantiate the plaintiff's case.

> It is not enough for the plaintiff to show that the employer made an unwise business decision, or an unnecessary personnel move. Nor is it enough to show that the employer acted arbitrarily or with ill will. These facts, even if demonstrated, do not necessarily show that *age* was a motivating factor.

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[8] *See, e.g., Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1427 (7th Cir. 1986) ("A subjective qualification assessment does not convert an otherwise legitimate reason into an illegitimate one.").

Gray v. New England Telephone and Telegraph Co., 792 F.2d 251, 255 (1st Cir. 1986) (emphasis in original) (citing *Chipollini v. Spencer Gifts, Inc.*, 613 F.Supp. 1156 (D.N.J. 1985), *rev'd* 814 F.2d 893 (3rd Cir.), *cert. dismissed*, 108 S.Ct. 26 (1987).[9] The court "does not sit as a super-personnel department that reexamines an entity's business decisions." *Dale v. Chicago Tribune Company*, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 954 (1987). "It is not the court's duty to determine the validity of the defendant's business decision as long as the decision was made in good faith." *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1426 (7th Cir. 1986).

Thus, when the issue is business judgment, the employee must do more than cast doubt on the correctness of the employer's reasons. *Dea v. Look*, 810 F.2d 12 (1st Cir. 1987). It is not sufficient for an employee to "challenge the judgment of his superiors through his own self-interested assertions." *Dale*, 797 F.2d at 464. A plaintiff cannot refute his employer's reason with his own perceptions of his qualifications or performance.[10]

If the plaintiff is somehow able to substantiate his challenge, for example, by producing witnesses with supervisory authority to support his claims of adequate performance to refute an employer's claim of poor performance, he may be able to show the employer's reason to be "unworthy of credence." However, it should be noted that refuting the facts underlying the employer's conclusion do not necessarily refute the conclusion itself.[11]

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[9] The Third Circuit's decision in *Chipollini* is discussed in detail at p. 23, *infra*.

[10] *See, e.g., Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980) ("[The employee's] perception of himself, however, is not relevant. It is the perception of the decision maker which is relevant.").

[11] In *Pollard v. REA Magnet Wire Company*, 824 F.2d 557 (7th Cir.), *cert. denied*, 108 S.Ct. 488 (1987), the employee demonstrated that his discharge was predicated upon his employer's erroneous belief that he was absent from work without permission to attend a body building event in Las Vegas, when in fact he was absent due

Cases in which the plaintiff is successful in demonstrating that the employer's reasons are "unworthy of credence" have the peculiar result of enabling a plaintiff to prevail without presenting any evidence whatsoever that an illegal criterion was a factor in the employer's decision. *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409-10 (7th Cir. 1984). Since "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," *Burdine*, 450 U.S. at 253, this Court should severely limit the type of case in which a plaintiff may recover without having produced any evidence tending to prove the ultimate fact in issue. Therefore, when an employer has a legitimate, albeit subjective, reason for his decision, which is supported by credible evidence, the plaintiff should not be able to overcome that reason merely by disagreeing with the employer's judgment.

2. *In Order To Survive A Motion For Summary Judgment, A Plaintiff Claiming Age Discrimination Must Do More Than Contest The Employer's Business Decisions.*

As *Burdine* teaches, the plaintiff in a discrimination case bears the ultimate burden of proof of intentional discrimination. This burden cannot be met merely by inviting a jury to second-guess the employer's legitimate business decisions, which fall within the realm of management prerogative unaffected by discrimination laws. Summary judgment is appropriate when there is no genuine issue of fact for trial. Therefore, when the plaintiff can do no more than attack a legitimate, subjective business decision with his own opinions of how the deci-

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to an ankle injury. Holding that "[a] reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination," 824 F.2d at 559, the Seventh Circuit reversed the lower court's finding of intentional discrimination. Thus, an employer's decision, if made in good faith, is not a "pretext" merely because it was based on facts which later prove to be incorrect.

sion should have been made, the case is ripe for summary judgment.

Rule 56(c) of the Federal Rules of Civil Procedure, which sets forth the standard for summary judgment, calls for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [12]

This Court developed the appropriate format for analysis of a summary judgment motion in *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986) and *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505 (1986). *Celotex* established that upon the filing of a motion for summary judgment, the moving party need not support the motion with evidence "negating the opponent's claim." Insted, the non-moving party must show that there is a genuine issue for trial. If the non-moving party "fail[s] to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," the moving party is "entitled to judgment as a matter of law." 106 S.Ct. at 2553.

Anderson clarified the phrase "genuine issue as to any material fact," holding that the threshold inquiry "is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reason-

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[12] Rule 56(c) states:

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

ably be resolved in favor of either party." 106 S.Ct. at 2511. This inquiry "must be guided by the substantive evidentiary standards that apply to the case." *Id.* at 2514.

In a discrimination case, therefore, after the defendant employer has articulated a legitimate non-discriminatory reason for its actions, the plaintiff may survive summary judgment only by demonstrating that a genuine issue of fact remains for trial by showing that the employer's proffered reason is a pretext for discrimination. If there is no direct evidence that a discriminatory reason more likely motivated the employer, the plaintiffs must prove pretext by demonstrating that the employer's explanation is "unworthy of credence." *Burdine*, 450 U.S. at 256.

As explained above, a discrimination plaintiff cannot prove that the employer's stated reason is "unworthy of credence" merely by questioning the wisdom of an otherwise legitimate business judgment. Since proof of pretext is an essential element of the plaintiff's case, summary judgment is appropriate when the plaintiff can provide no response other than an attack on the employer's business judgment.

A number of the Courts of Appeals have affirmed summary judgments in favor of the employer and against an ADEA plaintiff on this basis. In *Dale v. Chicago Tribune Company*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 954 (1987) the Seventh Circuit affirmed the granting of summary judgment for the employer when the plaintiff produced only "self-interested, conclusory assertions of discrimination" and "dubious statistical evidence," 797 F.2d at 465, and could "point to nothing in the record, besides his own perceptions, to support his assertion that his performance was adequate." 797 F.2d at 464. The plaintiff's affidavit and exhibits asserting that she had higher performance evaluations than the selectee, and that the job description was created after the fact, were insufficient to defeat summary judgment

in *Grigsby v. Reynolds Metals Company*, 821 F.2d 590 (11th Cir. 1987), where the employer presented extensive evidence supporting its decision. Similarly, the First Circuit in *Dea v. Look* affirmed summary judgment when "all that appellant could present was evidence casting doubt on the correctness of the employer's proffered reason for the discharge." 801 F.2d 12, 15 (1st Cir. 1987).[13]

3. *Summary Judgment For The Employer Is Appropriate When A Plaintiff, Terminated As A Result Of A Reduction In Force, Merely Challenges The Employer's Business Judgment.*

The foregoing analysis applies to all cases in which discrimination in employment is claimed, whether the issue is hiring, promotion, transfer, discipline or discharge. However, management discretion is particularly important when an employer, faced with mounting business losses, must reduce its workforce. The employer then has the unpleasant task of evaluating a number of qualified employees to select some for termination. In this situation, the employer must consider primarily the needs of the downsized company and which employees are best suited to serve those needs. The resulting decisions necessarily will be based on subjective factors and evaluations, including past job performance, background and qualifications, and the application of these factors to the requirements of the reduced workforce. Ultimately, qualified employees will be terminated solely for economic reasons. It is easy to see how terminated employees who are members of a protected class, knowing that they met the qualifications for their positions and that they have performed adequately in the past, might think, albeit erroneously, that unlawful criteria were involved in the termination process.

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[13] *See also Askin v. Firestone Tire & Rubber Co.*, 600 F.Supp. 751 (E.D. Ky. 1985), *aff'd*, 785 F.2d 307 (6th Cir. 1986), noting that " 'pretext' must be a pretext for discrimination, not a pretext of some other, ill-advised or unreasonable factor, such as a personality conflict or unreasonably high but evenly applied standards of performance." 600 F.Supp. at 755.

But termination of a qualified employee, even though that employee is a member of a protected class, does not in and of itself establish a prima facie case of discrimination. *LaGrant v. Gulf & Western Manufacturing Company, Inc.*, 748 F.2d 1087 (6th Cir. 1984). Since plaintiffs in job reduction cases often will be unable to show that they were replaced by an individual outside the protected class, a number of courts of appeals have noted that strict application of the *McDonnell Douglas* formula is inappropriate. Accordingly, it has been held that such a plaintiff instead must produce "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).[14]

Assuming, *arguendo*, that the plaintiff is able to raise a presumption of discrimination, the employer can be expected to offer the reduction in force as its explanation. If the plaintiff is unable to meet the employer's reasons with contrary direct evidence, such as a showing that the reduction also greatly reduced the average age of the workforce, the only remaining alternative, under *Burdine*, is to attempt to show that the employer's reason is

[14] *See also LaGrant*, 748 F.2d at 1091 (6th Cir. 1984) (plaintiff in a reorganization case "must come forward with additional direct, circumstantial, or statistical evidence that age was a factor in his termination in order to establish a prima facie case"); *Pace v. Southern Railway System*, 701 F.2d 1383 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983) (when plaintiff cannot demonstrate that he was replaced by a person outside of the protected class because his replacement was more than 40 years of age, the "determination turns on whether the plaintiff has presented sufficient evidence to provide a basis for an inference that age was a factor in the employment decision.") 701 F.2d at 1387; *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 399 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983) (to make out a prima facie case "a plaintiff must demonstrate facts sufficient to create a reasonable inference that age discrimination was 'a determining factor' in the employment decision." 711 F.2d at 342 (quoting *Cuddy v. Carmen*, 694 F.2d 853 (D.C. Cir. 1982).

"unworthy of credence." Where the employer's justification is wholly within the realm of management prerogative, inviting the court or the jury to evaluate the accuracy of the decision does not suffice.

An employer's articulated explanation is not always sacrosanct merely because it is based on a business judgment. For example, when the plaintiff shows that the employer's reason is demonstrably false in an objective evaluation, it follows that the reason *is* "unworthy of credence." For example, the plaintiff may show that a purported reduction in force did not in fact take place. *See, e.g., Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13 (7th Cir. 1987); *Hillebrand v. M-Tron Industries, Inc.*, 827 F.2d 363 (8th Cir. 1987).[15] Or, the employer's reason in and of itself may violate the ADEA. *See, e.g. Metz v. Transit Mix*, 828 F.2d 1202 (7th Cir. 1987) (cost saving is not a legitimate reason for replacing older employee with younger person who can be paid less).

Where, however, the attempt to disprove the employer's explanation is merely an invitation to second-guess the management decisions made by his employer in implementing the reduction in force, the plaintiff cannot prevail absent evidence of discrimination. *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421 (7th Cir. 1986). Therefore, where a plaintiff offers only his own protestations that he should have been selected to remain in the reduced work force, based on his own perceptions of his qualifications and past performance and his opinion of those who remained employed and their relative value to the reduced workforce, he merely challenges his employer's business judgment and has not proven the employer's reason to be "unworthy of credence." *See, e.g., Matthews v. Allis-Chalmers*, 769 F.2d 1215 (7th Cir. 1985).

[15] *See also Christie v. Foremost Insurance Company*, 785 F.2d 584 (7th Cir. 1986), where the employer did not follow its own reduction in force policy and a key decision-maker was unaware that there was such a policy, creating an inference that no legitimate reduction in force actually occurred.

Not surprisingly, several of the courts of appeals have endorsed summary judgment for the employer whose business decisions in implementing a reduction in force have resulted in charges of age discrimination.[16] In *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421 (7th Cir. 1986) the court refused to accept plaintiff's argument that a credibility issue existed when the contested conclusions were matters within the employer's business judgment. When the plaintiff's "termination came about as part of a legitimate economic job reduction" in *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1218 (7th Cir. 1985), the Seventh Circuit affirmed summary judgment because the plaintiff made no showing of discriminatory motive and intent. The Sixth Circuit reached a similar conclusion in *La Grant v. Gulf & Western Manufacturing Company, Inc.*, 748 F.2d 1087 (6th Cir. 1984) where the plaintiff had no evidence "other than his subjective determination that he was better qualified" to establish that age was a factor in his termination. 748 F.2d at 1091.[17]

In stark contrast to the opinions of the other circuits, the Third Circuit has reversed summary judgment orders in reduction in force cases solely because the plaintiff

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[16] In *Thornbrough v. Columbus and Greenville Railroad Company*, 760 F.2d 633 (5th Cir. 1985), where plaintiff challenged the employer's business judgment in selecting him for termination, the Fifth Circuit reversed a grant of summary judgment upon plaintiff's counsel's protestations that, had the case been permitted to proceed, Thornbrough would have presented witnesses to testify to his qualifications and abilities and cross-examined new and retained employees on their qualifications. *Thornbrough*, however, was decided prior to this Court's decision in *Celotex*, which requires the nonmoving party to establish the elements of his claim in order to defeat a summary judgment motion.

[17] *See also Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983) (summary judgment appropriate when plaintiff intends to attempt to prove pretext by challenging the credibility of the employer's witnesses on cross-examination); *Wehrly v. American Motors Sales Corp.*, 678 F. Supp. 1366 (N.D. Ind. 1988) (granting summary judgment in favor of employer when plaintiff merely challenged employer's view of his qualifications and past performance).

questioned the employer's business judgment.[18] In *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 108 S.Ct. 26 (1987), the Third Circuit concluded, merely because the employer's reason for discharge was subjective, that "the issue of pretext turns on Spencer's credibility and is not appropriate for resolution on a sumary judgment motion." 814 F.2d at 901.[19] Since the employer's reasons were completely within the realm of management prerogative, it is difficult to see how Chipollini's arguments, which did no more than attack the employer's perceptions of his past performance and future value to the company, supported Chipollini's ultimate burden of proving age discrimination. As Judge Hunter aptly observed in his dissenting opinion, "by allowing Chipollini to overcome Spencer's motion for summary judgment without introducing any evidence

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[18] *See, e.g., Sorba v. Pennsylvania Drilling Company, Inc.*, 821 F.2d 200 (3rd Cir. 1987), *cert. denied*, 56 U.S.L.W. 3461 (1988) (finding jury question on whether employer dismissed plaintiff because it believed his supervisors' reports of poor performance on three projects when plaintiff claimed the results were due to factors beyond his control, and concluding that otherwise it would be more likely than not that the decision was based upon his age); *Jackson v. University of Pittsburgh*, 826 F.2d 230 (3d Cir. 1987), *cert. denied*, 56 U.S.L.W. 3461 (1988) (although plaintiff's only record evidence was his own deposition, his explanations for poor performance, together with post hoc, although non-racial, remarks by supervisor, precluded summary judgment).

[19] The employer's articulated reasons for selecting Chipollini for termination during its force reduction were that (1) his performance evaluations had declined; (2) he was less cooperative and congenial than his replacement; (3) his health problems limited his ability to travel; and (4) he had performed poorly on a recent assignment. *Chipollini v. Spencer Gifts Inc.*, 613 F.Supp. 1156 (D. N.J. 1985), *rev'd*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, 108 S.Ct. 26 (1987). In response, Chipollini argued that (1) he had other evidence of good performance; (2) the employer could offer only a general perception that he was uncooperative, without specific examples; (3) his health problem did not affect his ability to travel; and (4) he had never been specifically assigned to the recent project mentioned by his employer, although he performed those duties. *Chipollini*, 814 F.2d at 901.

pointing to age discrimination, the majority has effectively and impermissibly shifted the burden of persuasion from Chipollini to Spencer." 814 F.2d at 903 (Hunter, J., dissenting).

The conclusion reached by the Third Circuit in *Chipollini* places a monumentally unfair burden on employers, a burden unwarranted by this Court's holding in *Burdine*. Under the *McDonnell Douglas* formula, as discussed by this court in *Burdine*, the employer is merely required to articulate a legitimate reason for its conduct. 450 U.S. at 253. This is a burden of production, not of proof; the employer need not even convince the court that it was "*actually motivated*" by those reasons. *Id.* at 254 (emphasis supplied).

An employer faced with a reduction in force has the regrettable task of choosing, often from a group of qualified employees, those which must be terminated for economic reasons alone. Under these circumstances, the decision necessarily will be based on subjective factors such as the decision-maker's opinion of each employee's past performance and potential for future contributions to the reduced workforce—all legitimate factors, but hardly capable of objective proof other than the decision-maker's testimony that those *were* the reasons, coupled with whatever documentary evidence there may be. Thus, it will be a rare case indeed in which a plaintiff, aided by hindsight, cannot produce "evidence," made up of his own assertions and perhaps with some support, that his employer could and should have used different reasons or placed more weight on some qualifications than others, or that the employer miscalculated the company's future needs. In response, the employer can only stand by his subjective yet legitimate reason.

If each case then turns on the "credibility" of the employer's reason, the employer's burden upon moving for summary judgment will be to prove, beyond a shadow of a doubt, that its business judgment is beyond reproach. A number of significant advantages are already available

to discrimination plaintiffs, namely the ability to make out a prima facie case and create an inference of discrimination without direct evidence, and the right to demonstrate "pretext" using evidence of other possibly biased conduct to persuade the court that a discriminatory reason more likely motivated the employer. If a plaintiff can "prove" the employer's reason to be "unworthy of credence" merely by inviting a jury to second-guess the employer's business decisions, the balance is tipped to an untenable degree. If this further advantage is allowed, it is difficult to imagine a discrimination case in which summary judgment will be proper.

II. THE DECISION TO TERMINATE BRIECK FALLS WITHIN HARBISON-WALKER'S MANAGEMENT PREROGATIVE, SO THAT SUMMARY JUDGMENT FOR THE EMPLOYER SHOULD HAVE BEEN AFFIRMED.

The case now before the Court is a fitting example of an attack on an employer's business judgment which should not be permitted to prevail. Brieck challenges Harbison-Walker's perception of the requirements of its reduced workforce and the abilities of its employees to fulfill its requirements with his own assertions that he should have been chosen for the single position remaining where four had been before. This attack strikes at the heart of Harbison-Walker's management prerogatives, which the ADEA was not designed to disturb. Moreover, the Third Circuit failed to follow this Court's holding in *Celotex* requiring the non-moving party on a motion for summary judgment to demonstrate a genuine issue of fact for trial, and instead placed the burden on Harbison-Walker to prove the absence of discriminatory intent. Pet. App. at 4a. Therefore, the Third Circuit erred in reversing the lower court's grant of summary judgment.

It is undisputed that Brieck was able to produce the minimal evidence necessary to make out a prima facie case under *McDonnell Douglas*. Brieck was over forty

years of age, was qualified for his own position, and was terminated, and an employee outside the protected class assumed his duties. Pet. App. at 2a.[20] Thus, it fell to Harbison-Walker to articulate a legitimate, nondiscriminatory reason for his termination. *McDonnell Douglas*, 411 U.S. at 804. With its motion for summary judgment, Harbison-Walker included the affidavit of William Sekeras, who as Manager of the Steel Group had made the final decisions on individual layoffs. Pet. App. at 3a. Sekeras explained that Brieck had been terminated as part of a reduction in force caused by business setbacks, and stated that his primary concern in selecting employees for retention or termination, and in particular in selecting one installation specialist out of four to retain, was "the ability of employees to perform the job functions remaining in the reduced business setting." J. App. at 13.

In support of the two decisions at issue, to lay off Brieck in July 1982 and recall Faust in July 1983, Sekeras emphasized the superior contributions which Faust was expected to make to the reduced workforce. Noting that Faust had higher performance evaluations than Brieck, Sekeras enumerated several other reasons, all rooted in Faust's prior experience, that Faust was more valuable to the company, given the type of future business anticipated. J. App. at 14. The company's sales to BOF shops, where Brieck's expertise lay, were extremely low, whereas Faust was the only installation specialist with experience in blast furnace casthouses, a targeted growth market with significant potential for Harbison-Walker. *Id.* Faust also surpassed Brieck in working with records and written reports, customer relations,

[20] It should be noted, however, that the Third Circuit never mentioned whether Brieck should be required to show that he was qualified for the position for which Faust was retained, although plaintiff in his affidavit and brief stated that he could "easily have been trained" to do the work which Faust was already able to do and thus tacitly admitted that he was not immediately qualified for the one remaining position. Pet. App. at 10a (Weis, J., dissenting).

and preparation of bids and quotations, which allowed him to perform functions other than that of an installation specialist. *Id.*

Harbison-Walker having articulated a legitimate reason for selecting Faust over Brieck for retention and recall, the presumption of discrimination raised by Brieck's prima facie case "dropped from the case," and the factual inquiry "proceed[ed] to a new level of specificity," allowing Brieck to demonstrate that Harbison-Walker's reasons were merely a pretext for discrimination. *Burdine*, 450 U.S. at 255. In response, Brieck produced no direct or indirect evidence of age discrimination. Instead, he argued, based on Faust's deposition testimony, that Faust in his new position spent seventy-five percent of his time doing installations, and the remaining twenty-five percent doing reports, which Brieck had also done, doing filing and working on margins.

This evidence, concluded the Third Circuit, was sufficient to raise a jury question as to the credibility of Harbison-Walker's reasons. Pet. App. at 5a. Relying on its prior decision in *Chipollini*, the Third Circuit reversed the district court's grant of summary judgment because "an ADEA plaintiff's evidence need only permit a reasonable inference that the employer's proffered explanation for the discharge is 'unworthy of credence.'" Pet. App. at 2a. While the court did not delve into the type of installations Faust was doing, it thought that the jury should consider whether or not Faust's more varied skills were actually put to use, reasoning that if they were not, the jury might find Harbison-Walker's reason to be pretextual.

In other words, Brieck and the Third Circuit are inviting a jury to second-guess Harbison-Walker's business judgment that its reduced workforce would need less than one full-time installation specialist so that the one person retained would be more valuable if he could perform other work as well. This trespasses into the realm of management prerogative which the ADEA was never

intended to disturb.[21] To defend against Brieck's challenge, based as it is on wisdom gained through hindsight, Harbison-Walker would have had to prognosticate, at the time of the force reduction in 1982, precisely the duties its one remaining installation specialist would be needed to perform later, although its orders for BOF installations were minimal and its hope for work in blast furnace casthouses a mere speculation.

Given Harbison-Walker's uncertain future, it is hardly "unworthy of credence" that the company retained the more versatile employee over one with narrow expertise. To infer discrimination merely because Harbison-Walker may have partially misperceived its future needs goes far beyond *McDonnell Douglas* and *Burdine*.

The Third Circuit's error is even more egregious considering that it failed to apply the *Celotex* standard concerning the moving party's burden on summary judgment. In *Celotex*, this Court unequivocally stated that "we find no express or implied requirement in [Fed. R. Civ. P.] Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." 106 S.Ct. at 2553 (emphasis in original). The court below, however, citing its earlier *Chipollini* decision, stated that "[t]o meet its burden on summary judgment, the defendant employer must show that the plaintiff will be unable to introduce either direct evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute." Pet. App. at 4a. Without question, this conclusion forces the employer to prove "absence of discriminatory motive" in direct contravention of this Court's decision in *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978).

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[21] *See, e.g., Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Parcinski v. The Outlet Company*, 673 F.2d 34 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983); *Jorgensen v. Modern Woodmen of America*, 761 F.2d 502 (1985).

As stated above, nearly every plaintiff will be able to develop post hoc theories of why the employer's business decision may have been unwise. To deny summary judgment absent any direct or indirect evidence of age discrimination merely because the employer's "credibility" is challenged on that basis, and because the employer cannot prove absence of a discriminatory motive, will foreclose summary judgment in favor of the employer in every discrimination case.

CONCLUSION

For the reasons stated, EEAC respectfully submits that the decision of the Third Circuit Court of Appeals should be reversed.

Respectfully submitted,

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